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SUPREME COURT, U. S.

Nos. 98 and 99

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Supreme Court of the United States

OCTOBER TERM, A. D. 1958.

ODD FELLOWS OAKRIDGE CEMETERY ASSOCIATION; PALM — I WILL LODGE NO. 58; PIPEFITTERS ASSOCIATION LOCAL UNION 597 — U. A.; VERNA UPELL ALBRIGHT; STANLEY C. BATTY and KRISTINE BATTY, his wife; WALTER BATTY; CLARENCE H. BELLMAN; ANNA B. BOLTON and JANE E. PRINZ, sisters; HUGH F. BRENNAN and CARRIE HESER BRENNAN, his wife; HAZEL M. BRIER; MATTHEW BURG; JENNIE CLINE; JACOB A. COOK and FLORA A. COOK, his wife; RUTH EDITH CRAMER; MARY E. CROSS; DU ROY B. DENNHARDT and ANN E. DENNHARDT, his wife; LOLA MAY DEUBEN; MINNIE DRINHAUS; DOROTHEA A. DUNNE; ROBERT H. EHLERS and EDITH A. EHLERS, his wife; EDITH FISCHER; FRANK J. FOLZ and DORA N. FOLZ, his wife; FLORENCE ANDREN FREED; ARLINE GARBER and PHYLLIS KRAMER, sisters; ANNA M. GEISSLER and ERNEST GEISSLER, her son; ROSEL GOLDSCHMIDT; EMILY CRAMER GROSSMAN; JULIUS E. HAEMMERLE and MARGUERITE H. HAEMMERLE, his wife; MARGARET HALLEMAN; MAMIE HAND; ARTHUR L. HENRIKSON and BEATRICE HENRIKSON, his wife; MILDRED HERMAN; ETHEL M. HILL; MARY ASHER HOOVER; WILLIAM J. HOSKINS; ESTELLA A. HURD; HARRIET E. JENKINS; CHRISTINE JURS; REUBEN C. KELBLE; JULIA KLEINSCHMIDT; EDWARD A. KOLSTEDT and ESTHER M. KOLSTEDT, his wife; IDA M. KUEHNLE; ELMER P. LADENDORF and EMMA M. LADENDORF, his wife; LOUISE LITTLE; LUCILLE L. LORENCE; GERTRUDE E. MAHNKE; EDWARD H. MENKE; JULIA T. MICHEL; WILLIAM J. MUNRO and HAZEL MUNRO, his wife; FRED MURPHY and ALMA MURPHY, his wife; MABEL L. NELSON; MAY NEU; SAMUEL F. NORMAN, individually and as Conservator of the Estate and Person of Ralph Reynolds, Incompetent; NICHOLAS OEHMEN and ALICE V. OEHMEN, his wife; EARL J. OVERTON and LUELLA A. OVERTON, his wife; WILLIAM A. PASSOW; MABEL E. PRESSLER; IRMA H. RADTKE; MATTIE SPIECE RAY; LAWRENCE RECKNER; PAUL E. RECKNER and PEARL M. RECKNER, his wife; LINCOLN RODMAN and HAZEL RODMAN, his wife; WILLIAM A. SCHALK; JOHN W. SCHIRMER and ELSIE M. SCHIRMER, his wife; BERTHA M. SMILIE; CLIFFORD P. SMITH and HARRIET E. SMITH, his wife; MILDRED E. SMITH; SHARON SNOW; JAMES STEWART and INA M. STEWART, his wife; EVA L. STUBBE; MARIE C. SURPLUS; ELSIE SWATEK; LAWRENCE J. TAMM and BESSIE M. TAMM, his wife; LOUISE R. TAMM; MAUD THORNTON; JULIA C. WEIGERT; EDWARD WHITE; RUDOLPH C. WILLIAMS and FLORENCE E. WILLIAMS, his wife; ADELINE G. VERBURG; ELAINE WANG; HARRY E. WRIGHT and ANNE I. M. WRIGHT, his wife; and GEORGE ZILBERMAN and BESSIE ZILBERMAN, his wife,

Appellants,

vs.

OAKRIDGE CEMETERY CORPORATION, VILLAGE OF WESTCHESTER and JOHN NUVEEN & CO.,

Appellees.

Appeals from the Appellate Court of Illinois, First District, and Supreme Court of Illinois.

BRIEF OPPOSING MOTION TO DISMISS

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IN THE

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OCTOBER TERM, A. D. 1958.

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Appellees.

Appeals from the Appellate Court of Illinois, First District, and Supreme Court of Illinois.

BRIEF OPPOSING MOTION TO DISMISS

Oakridge Cemetery Corporation and the Village of Westchester, two of the three appellees, have filed a motion to

dismiss these appeals alleging all the grounds permitted by Rule 16, 1 (b). John Nuveen & Co., the other appellee, does not join in the motion.

Appellees do not seriously question the statement of facts set forth at pages 10 to 30 of the jurisdictional statement and, therefore, this Court can assume that such statement of facts is substantially correct for the purposes of ruling on appellees' motion to dismiss.

1

Some factual inaccuracies contained in appellees' motion.

The statement at the bottom of page 3 of appellees' motion purporting to set forth the relief sought in these proceedings and the grounds therefor is inaccurate. The relief sought, the grounds therefor, and the federal questions raised are accurately set forth at pages 3, 7 to 10 and 28 to 30 of the jurisdictional statement.

As pointed out at page 49 of the jurisdictional statement, the 1924 plat of Oakridge Cemetery, plaintiffs' exhibit 9 (2 Abs. 32), is the official plat of Oakridge Cemetery as of that date. On that plat the area in the southeastern portion of the Cemtery, which includes the subject site, was platted and designated for "Large Single Graves".

The expressions "utility tract" and "boundary of burial grounds" were coined by defendants for the purpose of this lawsuit. Exhibit 4 attached to Westchester's answer (2 Abs. 9) and defendants' exhibit A (2 Abs. 125) are copies of the 1924 plat, plaintiffs' exhibit 9 (2 Abs. 32), doctored up for the purposes of this lawsuit. The legends "utility tract" and "boundary of burial grounds" found on those copies are wholly fictitious. Fred Schuth, who has been with Oakridge Cemetery 42 years and has been general superintendent of the Cemetery since 1925 (1 Abs. 222), admitted on cross-examination that it was not until after this lawsuit was commenced and defendants were in the course of preparing their defense, that the expressions

"utility tract" and "boundary of burial grounds" were conceived and superimposed upon the copies of the 1924 plat by Arthur S. Johnson, then associated with Westchester (1 Abs. 364), for use in this litigation. Schuth admitted that he could not remember ever before having noted the legend "utility tract" or the legend "boundary of burial grounds" upon any plat of Oakridge Cemetery. (1 Abs. 250, 251) Schuth also admitted that there is no hedge or anything in the Cemetery itself that would indicate or identify any "boundary of burial grounds" such as defendants attempt to portray by superimposing this fictitious legend upon copies of the 1924 plat and using such copies as exhibits in this litigation. Elsewhere in the record it is abundantly established that the legend "boundary of burial grounds" is purely a figment of an overactive imagination. (1 Abs. 277-279, 296, 364-366, 415, 416) During the cross-examination of Mr. Johnson, the master asked defendants' counsel, Mr. Guthrie, the following question and received the following answer (1 Abs. 365):

> "The Master: Isn't it conceded that this designation 'Boundary of Burial Grounds' has been put in by the witness, and it is an artificial designation.
> Mr. Guthrie: Yes."

For the purposes of their motion to dismiss these appeals, appellees have superimposed these artificial and fictitious legends, "utility tract" and "boundary of burial grounds", upon their exhibits B-1 and B-2, being aerial photographs taken September 18, 1955 of the southeastern portion of the Cemetery, and have attached copies of those exhibits, with the fictitious legends superimposed, to their motion following page 8 thereof.

The copies of defendants' exhibits B-1 and B-2 attached to appellees' motion do not depict the normal and usual appearance of the southeastern portion of Oakridge Cemetery in another respect. Shortly before, if not in anticipation of, the filing of the complaint in the lower court on

September 2, 1955, the Cemetery Corporation in August 1955 removed the black top soil from an area approximately 100 feet wide north and south, adjoining the southern boundary of the Cemetery, commencing approximately 100 feet east of section 25 and extending eastward. The black top soil thus removed is for use wherever needed in the Cemetery. The Cemetery Corporation is currently refilling this 100-foot strip with excess soil from new graves. (1 Abs. 230) Defendants took a number of photographs, including their exhibits B-1 and B-2, prominentiy displaying this shallow excavation and put them in evidence as defendants' exhibits B-1, B-2, D-1, D-2 and D-5. (2 Abs. 2, 3, 127, 128, 131) This shallow excavation is responsible for the light colored strip along the southern boundary of the Cemetery appearing on defendants' exhibits B-1 and B-2 attached to appellees' motion. However, the normal appearance of the Cemetery east of section 25 is shown by plaintiffs' exhibit 10 (2 Abs. 33), a photograph taken in July 1955 shortly before the black top soil was removed from the 100-foot strip. From this photograph it is apparent that Oakridge Cemetery east of section 25 was level, was well sodded and had a beautiful park-like appearance. Fred Schuth, superintendent of Oakridge Cemetery, admitted that plaintiffs' exhibit 10 accurately shows the normal condition of that portion of the Cemetery as it has been for many years. (1 Abs. 243) The witness, G. H. Rutt, who has been familiar with Oakridge Cemetery for many years, and was in the Cemetery on several occasions since 1945, testified that plaintiffs' exhibit 10 is a very good reproduction of the southeastern portion of the Cemetery as it appeared on the occasions he visited it. (1 Abs. 214)

Schuth also admitted that when the excavation caused by the removal of the black top soil from the 100-foot strip is refilled to proper grade and level by excess soil from new graves—which he estimated will take from 18 months to 2

years—it will be levelled off and resodded. (1 Abs. 230, 242) The area east of section 25 will then have its normal appearance as shown in plaintiffs' exhibit 10. (2 Abs. 33)

The southeastern portion of the Cemetery is not barren of trees and shrubs, as appellees assert at page 8 of their motion. Opposite page 1 of the jurisdictional statement there is an aerial photograph showing all of Beautiful Oakridge, taken in 1945, being plaintiffs' exhibit 18 (2 Abs. 39) While it appears that there are less trees and shrubs in the southeastern portion of the Cemetery than in the central portion, it also appears that there are less trees and shrubs in the northwestern and southwestern portions of the Cemetery than in the central portion. The northwestern and the southwestern portions which, like the southeastern portion, have fewer trees and shrubs than the central portion, contain many burials and admittedly are part of Oakridge Cemetery.

The density of the trees and shrubs, therefore, has no probative value in proving or disproving what land is or is not part of Oakridge Cemetery.

The so-called "road" which appellees refer to at page 8 of their motion as "extending along the boundary of the burial grounds, separating the burial grounds from the utility tract" can be nothing more than a driveway which constitutes part of the system of driveways for the entire Cemetery. This system of driveways is shown on the plat of Oakridge Cemetery found at page 18 of appendix to the jurisdictional statement. It will be noted from that plat that the Cemetery's system of driveways extends into the southeastern portion of the Cemetery by a driveway running southeast from the southeast corner of section 18 and then north to the southwest corner of section 17. Moreover, there is no driveway along the western extremities of sections 26 and 26-A, in which sections there are a large number of burials. Obviously there is no "road" which

marks any boundary of Oakridge Cemetery, other than the public highways or streets along the northern and western boundaries of the Cemetery.

The so-called "fence" which appellees refer to at page 8 of their motion as "extending along the boundary of the burial grounds, separating the burial grounds from the utility tract" is nothing more than a single strand of wire about 30 inches above ground supported by small steel stakes, which runs along the east of section 25 and along the south and east of section 18. This wire can be seen in plaintiffs' exhibit 10 (2 Abs. 33) and was placed there several years ago to keep vehicles off the grass in the southeastern part of the Cemetery. (1 Abs. 244, 292) There is no such wire along the south of section 16-A or along the west of sections 26 and 26-A. Obviously, there is no "fence" separating the southeastern portion from the rest of the Cemetery.

Despite appellees' assertion to the contrary at page 8 of their motion, water is available from the Cemetery's water system to the southeastern portion of the Cemetery, according to Clyde Ryan, former president of the Cemetery Corporation. (1 Abs. 212, 219)

Appellees' assertion at page 8 of their motion that the southeastern portion of the Cemetery was used as farm land prior to 1935 is based on the testimony of defendants' witness Schuth, who testified that years ago the Cemetery Corporation permitted Godfrey Peck, an old employee, as a favor and without charge, to plant corn in the southeastern portion of the Cemetery. (1 Abs. 254, 255) Schuth's testimony on this point is contradicted by two disinterested witnesses. Ann Guzzardo, an employee of a Chicago law firm and secretary from 1925 to 1931 to a former president and principal owner of Oakridge Cemetery, testified that she saw the southeastern portion of the Cemetery many times during those years and did not recall any cornfield.

(1 Abs. 264-266) Elmer Clausen, an engineer and registered surveyor, who was at the Cemetery many times during the years 1921 to 1927 and surveyed and laid out a number of areas into family burial lots, and was in and observed in the southeastern portion of the Cemetery many times, testified positively that there was no cornfield there at any time during those years. (1 Abs. 297, 298, 303)

Noah Abram, president of Baptist Home and Hospital and an undertaker, has known the appearance of the southeastern portion of the Cemetery for 10 years. He testified it has been kept in an orderly condition as a Cemetery would be. (1 Abs. 345) Mr. Rutt who, as above stated has been familiar with Oakridge Cemetery for many years, was in the Cemetery on several occasions since 1945, testified that on the various occasions he saw it, the southeastern portion was level, sodded, mowed and had a very nice looking appearance. (1 Abs. 210, 211, 216) Harold F. Enright, who inspected the Cemetery in the summer of 1953 and again in the fall of 1955, testified that on both occasions the southeastern portion of the Cemetery was level and beautifully sodded (1 Abs. 293, 294, 295), and Schuth, himself, testified that, apart from the patches covered by the black dirt pile and the leaf pile, the southeastern portion of the Cemetery has always been in grass and that it was mowed as often and at the same time as sections of the Cemetery where there were graves. (1 Abs. 333, 334)

The Appellate Court refused to agree with appellees' version of the appearance and use of the southeastern portion of the Cemetery. The Appellate Court (p. 4 of appendix to jurisdictional statement) referred to the circumstance that parts of the southeastern portion were used as a sod nursery, as a place to store and burn used flowers and grave decorations and to pile leaves and black dirt. At page 52 of the jurisdictional statement, it is pointed out that the patches used for these incidental cemetery purposes

were small indeed, and probably constituted less than 1% of the 9-acre area involved. The Appellate Court expressly found:

> "The remainder of the tract (referring to the southeastern portion of the Cemetery) was planted with grass and kept in a park-like condition."

Also, the Appellate Court (p. 10 of appendix to jurisdictional statement) referred to the southeastern portion of the cemetery adjoining the subject as

> "the beautiful and well-kept ground of the cemetery."

The assertion of appellees at page 13 of their motion that appellants argue that past application by Oakridge Cemetery Corporation for tax exemption on all property owned by it estops the Cemetery Corporation from claiming that the land exempted was not used for burial purposes is an inaccurate statement of appellants' position.

The southeastern portion of the Cemetery, including the subject site, has, with other parts of the Cemetery, been exempt from taxes for over half a century. Appellants contend that exemption from taxes for so many years is strong, if not conclusive, evidence that the owners intended to, and did, effect a common law dedication of the land thus exempted, and the authorities cited at page 56 of the jurisdictional statement so hold.

2

Appellees' nuisance theory.

Appellees attempt to confuse the issues by arguing, at pages 12 and 13 of their motion, that the proposed standpipe and pumphouse are not a nuisance. Appellants' rights do not depend upon the standpipe and pumphouse being declared a nuisance. However, it does not follow, because the standpipe and pumphouse may not be a nuisance in a commercial or industrial district where they belong, that they would not be a nuisance if placed in a cemetery. As this Court well said in *Euclid* v. *Ambler Realty Co.* (1926) 272 U. S. 365, 71 L. ed 303 at page 388:

> "A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard."

In *Trustees of The First Evangelical Church* v. *Walsh* (1870) 57 Ill. 363 the court said that burying places become public immunities or common privileges and any ill-founded right which, when carried into effect, would disturb the enjoyment of those immunities or privileges would be a public nuisance. In *Hertle* v. *Riddell* (1907) 127 Ky. 623, 106 S. W. 282 a dog had been buried in a cemetery. The question was whether the court should order the remains removed. It was a small dog and well buried. Defendants argued that the presence of the remains under those conditions did not create a nuisance. The court, however, was of the opinion (p. 635) that there was "much more involved * * * than a mere physical nuisance" and ordered the remains removed.

At pages 35 to 37 of the jurisdictional statement it is shown that the law regards cemeteries as sacred, religious and holy, and recognizes that attractiveness and beauty are important attributes of cemeteries. They are, in this respect, similar to public parks. Gravesite owners select cemeteries because of these qualities and spend large sums of money for this purpose. In addition to the millions of dollars the public have expended over the years in memorializing and beautifying Oakridge Cemetery, the public have deposited over $1,000,000 in trust with the Cemetery Corporation for the perpetual care and maintenance of their gravesites and the Cemetery as a whole. The law will not permit the religious and sentimental sensibilities of gravesite owners to be wounded, or the attractiveness or beauty which in a large degree they have bought and paid for, to be marred by converting part of the Cemetery to a use inimical and foreign to a suitable last resting place for the ashes of the dead.

Gravesite owners, or persons having relatives or friends buried in cemeteries, have successfully maintained actions to enjoin defacing or meddling with graves (*Davidson* v. *Reed* (1884) 111 Ill. 167; *Wormley* v. *Wormley* (1904) 207 Ill. 411; *Brown* v. *Hill* (1918) 284 Ill. 286; *Smith* v. *Ladage* (1947) 397 Ill. 336); to enjoin obstructing a highway leading to the cemetery (*Nelson* v. *Randolph* (1906) 222 Ill. 531); to set aside a sale of an unused portion of the cemetery for building purposes (*Smith* v. *Humbervale Cemetery Company* (1914) 33 Ontario Law Reports 452); to enjoin the sale of a portion of the cemetery to be used for the purposes of a public library (*Chew* v. *First Presbyterian Church of Wilmington* (1916, D. C. Del.) 237 Fed. 219); to enjoin the sale of a portion of the cemetery for business purposes (*Woodland Cemetery Company* v. *Ellison* (1902) 23 Ky. L. Rep. 2222); to enjoin mining for gypsum pursuant to a lease executed by the cemetery corporation *Briggs* v. *Bloomingdale Cemetery Association* (1920) 113 Misc. 685, 185 N. Y. Supp. 348); to recover damages due to oil drilling operations in the cemetery (*Humphreys* v. *Bennett Oil Corporation* (1940) 195 La. 531, 197 So. 222); to enjoin the use of a portion of the cemetery by a college for a pergola and class exercises (*Wilder* v. *Evangelical Lutheran Joint Synod* (1929) 200 Wis. 163, 227 N. W. 870); to compel the removal of a dog buried in the cemetery, although the dog was a small dog and was well buried (*Hertle* v. *Riddell* (1907) 127 Ky. 623, 106 S. W. 282); to compel the removal of a small stone erected in memory of a dog upon which were the words "Our Pet" (*St. Peter's Evangelical Lutheran Church* v. *Bean* (1905) 15 Pa. Dist. Rep. 636); and to require the cemetery corporation to keep walks, drives and approaches in repair. *Houston Cemetery Company* v. *Drew* (1896) 13 Tex. Civ. App. 536, 36 S. W. 802.

Other uses of cemetery property which courts have considered improper are: Highway purposes (*County Board*

of Commissioners for Clarendon County v. *Holladay* (1936) 182 S. C. 510, 185 S. E. 885); municipal water tower (*Beth Medrosh Hagodal Cemetery Association* v. *City of Aurora* (1952) 126 Colo. 267, 248 P. 2d 732); and railroad right-of-way. *Memphis State Line Railroad Company* v. *Forest Hill Cemetery Co.* (1906) 116 Tenn. 400, 90 So. 69.

The fact that the proposed use or structure would be unsightly or out of place in a cemetery and offensive to religious and sentimental sensibilities of the ordinary person who owns or is interested in gravesites, is the principal, if not the sole, reason underlying all these decisions. And in most all of the cases the proposed use or structure was held improper without discussion by the courts of whether it would constitute a nuisance. Perhaps the courts proceeded on the principle, as did the Kentucky court in *Hertle* v. *Riddell, supra*, that where desecration of a cemetery is threatened there is

> "much more involved * * * than a mere physical nuisance."

3

The absence in the deeds whereby the Cemetery Corporation acquired title to Oakridge Cemetery of covenants restricting the use or disposition of the land is immaterial.

At page 7 of their motion appellees make a point of the circumstance that the deeds whereby Oakridge Cemetery Corporation acquired title to the land comprising Oakridge Cemetery do not contain express provisions restricting the use or disposition of the land.

At page 54 of the jurisdictional statement it is pointed out in the summary of facts showing a common law dedication, that the conveyances to the single purpose Cemetery Corporation organized to acquire, maintain and operate **"a cemetery"** will be regarded to have been made for cemetery purposes the same as though cemetery purposes were

expressed in the deeds. This is referred to as one of the many facts and circumstances which show a common law dedication. But such restrictive provisions, either express or implied, are not essential, and their absence would be of no benefit to appellees in this litigation.

The absence of such provisions, of course, does not prevent the application of the rule of cemetery law which gives persons who own or are interested in gravesites an interest in the cemetery as a whole. The absence of such provisions does not establish that the land has not been dedicated to cemetery purposes under the principles of common law dedication, or that the land has not been impressed with a trust for cemetery purposes. And the absence of such provisions in no way affects the beneficial interest of appellants in the note and trust deed of November 26, 1943.

While on the subject of restrictive provisions in deeds, it is of legal significance, as pointed out at pages 20 and 21 of the jurisdictional statement, that pursuant to a uniform plan of development of Beautiful Oakridge, the owners have sold almost 78,000 gravesites to the public and have conveyed numerous gravesites to the public by deeds containing express provisions restricting the use of the land to burial purposes. (1 Abs. 12, 2 Abs. 54, 56) The deeds are made subject to the elaborate rules and regulations of the Cemetery Corporation then or thereafter in force, discussed at pages 21 to 23 of the jurisdictional statement, which contain further restrictions as to the use of the land. Many of these deeds have from time to time been filed, recorded and made a matter of public record in the office of the recorder of deeds of Cook County, Illinois (1 Abs. 357), thereby imparting notice to the public, upon which the public had a right to rely, that the land comprising Oakridge Cemetery was to be used for burial or cemetery purposes only.

4

The federal questions were timely and properly raised.

In their motion, appellees set forth as a ground for dismissal of these appeals that the federal questions sought to be reviewed were not timely and properly raised. However, they do not press this ground in their brief in support of the motion.

The federal questions involved are set forth at pages 7 to 10 of the jurisdictional statement, and the time and manner in which they were raised are set forth at pages 28 to 30 thereof. These federal claims were pressed upon the Illinois courts from the beginning to the end of the proceedings in those courts. They were asserted in the complaint, in objections to the master's report, in exceptions to the master's report, in the notice of appeal to the reviewing courts, and in appellants' brief in the reviewing courts.

It should, perhaps, be added here that under the Illinois appellate practice assignments of error have been abolished in appeals to the Illinois Supreme Court (Illinois Supreme Court Rule 36(2)(a); 2 *Ill. Rev. Stat.* 1957, ch. 110. par. 101.36) and in appeals to the Illinois Appellate Court. Illinois Appellate Court Rule 1(2)(a); Id. par. 201.1

5

The federal questions were presented to the Illinois Appellate Court.

At pages 4 and 14 of their motion appellees attempt to create the impression that the federal questions involved in these appeals were not presented to the Illinois Appellate Court.

As pointed out at page 3 of the jurisdictional statement, the 109 appellants originally appealed directly to the Illinois Supreme Court and the appeal was docketed in that Court as no. 34231. On November 27, 1956 the Illinois Supreme Court, on its own motion and without opinion,

entered an order transferring the case to the Appellate Court. This transfer was made pursuant to section 86 of the Illinois Civil Practice Act (2 *Ill. Rev. Stat.* 1957, ch. 110, par. 86) and Illinois Supreme Court Rule 47. (2 *Ill. Rev. Stat.* 1957, ch. 110, par. 101.47) Pursuant to that order and the statute and rule of court, the Clerk of the Illinois Supreme Court transmitted the complete record, documents and files, including the abstract of record, appellants' brief, appellees' brief and appellants' reply brief, theretofore filed in the Illinois Supreme Court to the Clerk of the Appellate Court. The Clerk of the Appellate Court filed such record and documents, and docketed the case in the Appellate Court and the case proceeded in the Appellate Court as though the appeal had originally been taken to that Court. The Appellate Court heard the case on the same record, abstracts and briefs that were originally filed in the Illinois Supreme Court in no. 34231.

Thus, under compulsion of the Illinois Supreme Court's transfer order, appellants presented to the Appellate Court all and the same questions that were presented to the Illinois Supreme Court, including the federal questions involved in these appeals, set forth at pages 7 to 10 of the jurisdictional statement.

6

The judgment of the Illinois Appellate Court does not rest on an adequate non-federal basis and the failure of that Court expressly to refer to or pass upon the federal questions is immaterial.

At pages 4 and 14 of their motion appellees assert that the decision of the Appellate Court rests on state or local grounds and they mention the failure of the Appellate Court expressly to refer to or pass upon the federal questions presented. These contentions are without merit.

Throughout the proceedings in the Illinois courts appellants claimed that they have valuable contractual and vested rights and interests in the approximately 120 acres

of land, including the subject site, comprising Oakridge Cemetery by reason of the rule of cemetery law which gives persons who own or are interested in gravesites an interest in the Cemetery as a whole, by reason of a common law dedication for cemetery purposes, by reason of a trust impressed upon the land for cemetery purposes, and by reason of appellants' beneficial interest in the note and trust deed dated November 26, 1943.

Throughout the proceedings in the Illinois courts the appellants claimed that if the Westchester ordinances and resolution and provisions of the Illinois Corporation Law in question were construed or applied so as to authorize Westchester to acquire the subject site free and clear of appellants rights and interests therein without compensating appellants therefor, and to authorize Westchester to erect and operate thereon the huge standpipe and pumphouse without compensating appellants for the damages they will sustain, and in disregard of appellants' feelings and religious sensibilities, such ordinances, resolution and statutory provisions would be invalid as being repugnant to designated provisions of the constitution of the United States.

It is true that, in addition to these federal grounds, appellants asserted in the Illinois courts certain other grounds for relief which might be regarded as non-federal grounds, such as (1) the sale of the subject site for the purposes proposed was prohibited by the Illinois Act of 1891 relating to cemeteries (1 *Ill. Rev. Stat.* 1957, ch. 21, par. 29); and (2) the use of the subject site for the purposes proposed was prohibited by the Cook County zoning ordinance.

These proceedings, therefore, presented to the Illinois courts multiple issues, some federal and others non-federal. And, though it was possible for the Illinois courts to decide the case *in favor* of appellants on non-federal grounds and thus avoid the necessity of passing upon the federal questions, it was not possible for the Illinois courts to decide the

case *against* the appellants without either expressly or impliedly denying the claims asserted by appellants under the federal constitution and thus deciding the federal questions involved adversely to appellants.

Whether or not appellants were possessed of the valuable contractual and vested rights and interests claimed involved mixed questions of law and fact.

The alleged non-federal ground upon which the Appellate Court's judgment is supposed to be based is that under sections 1 and 5 of the Illinois Corporation Act of 1872 and certain court decisions cited at pages 9 and 10 of appellees' motion, Oakridge Cemetery Corporation has the power to sell and dispose of so-called unneeded land; that the subject site is unneeded land; and that, therefore, the sale of the subject site to Westchester is authorized under state or local law. This, of course, necessarily assumes that the Cemetery Corporation is the sole and exclusive owner of the land sold and that appellants have no rights or interests therein, for sections 1 and 5 do not purport to vest in the Cemetery Corporation power to sell and dispose of property belonging to others, and if they did, they would clearly be invalid as being repugnant to the federal constitution.

And, of course, none of the cases cited at pages 9 and 10 of appellees' motion holds that a cemetery corporation can sell and dispose of property in which others have vested rights and interests free and clear of those rights and interests. Those cases, therefore, are obviously not in point and need not be further considered.

The Appellate Court's opinion is remarkable for its failure to mention so many of the undisputed and controlling facts set forth at pages 10 to 30 and 54 to 60 of the jurisdictional statement. It is remarkable for its failure to mention any of the important federal questions involved. The opinion does not mention the rule of cemetery law which gives persons who own or are interested in gravesites an

interest in the Cemetery as a whole, or any of the authorities sustaining that rule cited at pages 31 to 33 of the jurisdictional statement, although all those authorities were cited to the Appellate Court; it does not mention the important question of common law dedication, or any of the authorities bearing on that question cited at pages 40 to 54 of the jurisdictional statement, although all such authorities were cited to the Appellate Court; it does not mention many of the undisputed and controlling facts which appellants urged upon the Appellate Court as establishing a common law dedication; it does not mention the question of whether the land was impressed with a trust for cemetery purposes, or any of the authorities bearing on that question cited at page 60 of the jurisdictional statement, although all those authorities were cited to the Appellate Court; and it does not mention the note and trust deed of November 26, 1943, although they and appellants' beneficial interests therein were called to the Appellate Court's attention.

The Appellate Court necessarily proceeded on one or the other of the following assumptions: Either that appellants are possessed of the valuable contractual and vested rights and interests claimed, or that appellants are not possessed of those rights and interests.

If the Appellate Court proceeded on the assumption that appellants are possessed of the valuable contractual and vested rights and interests claimed, and that the Cemetery Corporation, nevertheless, had the power to sell and dispose of the subject site free and clear of those rights and interests, the judgment of the Appellate Court clearly deprives appellants of fundamental rights, interests and privileges protected by the federal constitution, the jurisdiction of this Court to review that judgment is clear, and reversal would probably follow as a matter of course. If, on the other hand, the Appellate Court proceeded on the assumption that appellants are not possessed of the valuable

contractual and vested rights and interests claimed and that the Cemetery Corporation, therefore, has the power to sell and dispose of the subject site notwithstanding the claims asserted by appellants, the judgment of the Appellate Court clearly denied the claims of appellants that they possess fundamental rights, interests and privileges protected by the federal constitution and the jurisdiction of this Court to review that judgment is likewise clear. In this event, it would be incumbent upon this Court to assume jurisdiction and examine the evidence and applicable local law in order to ascertain whether the facts give rise to the contractual and vested rights and interests claimed by appellants. In such a case, this Court cannot perform its duty to enforce the guarantees of the federal constitution as to inviolability of contractual and vested rights and interests unless the Court gives the questions independent consideration.

A leading case directly in point is *Appleby* v. *New York* (1926) 271 U. S. 364, 70 L. ed 992 where it appears that the Applebys held title to two underwater lots in the City of New York on the east side of the Hudson or North river by virtue of two deeds from the City executed in 1852 and 1853. Pursuant to New York statutes passed in 1857 and 1871 the City established bulkheads and made plans for harbor development. The City owned wharves adjoining Applebys' land and dredged the land to deepen the water to accommodate boats desiring to use the City's wharves. The Applebys commenced proceedings to enjoin the City and other defendants from dredging the land and using the water over the land as a slip or permanent mooring place. The injunction proceedings raised the question of the nature and extent under New York law of the contractual and vested rights and interests of the Applebys in the land and water in question. The New York courts denied relief and

the Applebys sued out a writ of error from this Court on the ground that the New York courts interpreted and applied the acts of 1857 and 1871 in such a way as to impair rights protected by the federal constitution. This Court assumed jurisdiction and reversed the New York court, holding that under the New York law the Applebys had such contractual and vested rights and interests in the land and water in question as entitled them to the injunction requested.

This Court said at page 379:

> "The questions we have here to determine are, first, was there a contract, second, what was its proper construction and effect, and, third, was its obligation impaired by subsequent legislation as enforced by the state court? These questions we must answer independently of the conclusion of that court. Of course, we should give all proper weight to its judgment, but we cannot perform our duty to enforce the guaranty of the Federal Constitution as to the inviolability of contracts by state legislative action unless we give the questions independent consideration. It makes no difference what the answer to them involves, whether it turns on issues of general or purely local law, we cannot surrender the duty to exercise our own judgment. In the case before us, the construction and effect of the contract involved in the deeds and covenants depend chiefly upon the extent of the power of the State and city to part with property under navigable waters to private persons, free from subsequent regulatory control of the water over the land and the land itself. That is a state question, and we must determine it from the law of the state, as it was when the deeds were executed, to be derived from statutes then in force and from the decisions of the state court then and since made; but we must give our own judgment derived from such sources and not accept the present conclusion of the state court without inquiry.
>
> Ordinarily this court must receive from the court of last resort of a state its statement of the state law as final and conclusive, but the rule is different in a case like this."

In line with the decision in the *Appleby case,* where it is claimed that contractual or vested rights and interests have been unconstitutionally impaired or invaded by the judgment of a state court, this Court, "in order that the constitutional mandate may not become a dead letter," will assume jurisdiction and decide for itself whether such contractual or vested rights and interests exist, and the nature and extent thereof. *Indiana* v. *Brand* (1938) 303 U. S. 95, 100, 82 L. ed 685; *Coombes* v. *Getz* (1932) 285 U. S. 434, 441, 76 L. ed 866.

In the case at bar the Appellate Court could not deprive appellants of fundamental rights, interests and privileges protected by the federal constitution by failing to mention or pass upon basic facts claimed to give rise to such federal rights, interests and privileges. In such a case this Court will assume jurisdiction and examine the evidence in order to determine what facts may reasonably be found therefrom which would furnish a basis for the asserted federal rights. *Carlson* v. *Washington* (1914) 234 U. S. 103, 106, 58 L. ed 1237; *Merchants National Bank* v. *Richmond* (1921) 256 U. S. 635, 638, 65 L. ed 1135; *Brooklyn Savings Bank* v. *O'Neil* (1945) 324 U. S. 697, 703, 89 L. ed 1296.

If the Appellate Court expressly or impliedly found adversely to appellants as to facts alleged to give rise to fundamental rights, interests and privileges protected by the federal constitution, this Court will not accept the action of the Appellate Court as final, but will examine the evidence to ascertain whether fundamental federal rights, interests or privileges have been denied. In *Davis* v. *Wechsler* (1923) 263 U. S. 22, 68 L. ed 143 this Court said at page 24:

> "Whatever springes the state may set for those who are endeavoring to assert rights that the state confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. • • • If the Constitution and laws of the United States are to be enforced, this court cannot

> accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds."

In *Norris* v. *Alabama* (1935) 294 U. S. 587, 79 L. ed 1074 this Court said at page 590:

> "When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is encumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured."

Where it is contended that rights under the constitution or laws of the United States have been denied as a result of the State court's erroneous view of the facts, this Court has, on many occasions, assumed jurisdiction, analyzed the evidence, and reversed the State court's judgment. See also *Creswell* v. *Grand Lodge K. of P.* (1912) 225 U. S. 246, 56 L. ed 1074; *Ward* v. *Love County* (1920) 253 U. S. 17, 64 L. ed 751; *Fiske* v. *Kansas* (1927) 274 U. S. 380, 71 L. ed 1108; *Ancient Egyptian Arabic Order, N. M. S.* v. *Michaux* (1929) 279 U. S. 737, 73 L. ed 931; *Beilder* v. *South Carolina* (1930) 282 U. S. 1, 75 L. ed 131; *Johnson Oil Ref. Co.* v. *Oklahoma* (1933) 290 U. S. 158, 78 L. ed 238; *Great Northern R. Co.* v. *Washington* (1937) 300 U. S. 154, 81 L. ed 573.

It is well settled that an alleged non-federal ground of state court decision, in order to defeat this Court's jurisdiction, must be an "independent" non-federal ground. This means that it must be independent of any federal grounds. It cannot be "interwoven with" federal questions, and it must be of "sufficient breadth" to sustain the state court's judgment without any decision of the federal rights. If rec-

ognition or enforcement of the alleged non-federal ground necessarily operates as a denial of claimed federal rights, the alleged non-federal ground is not "independent" of but is "interwoven with" federal grounds, and is not of "sufficient breadth" of itself to sustain the state court's judgment. (*Chicago, B. & Q. R. Co.* v. *Illinois* (1905) 200 U. S. 561, 580, 50 L. ed 596) In *Abie State Bank* v. *Bryan* (1931) 282 U. S. 765, 75 L. ed 690 this Court said at page 773:

> "But the federal ground being present, it is incumbent upon this court, when it is urged that the decision of the state court rests upon a non-federal ground, to ascertain for itself, in order that constitutional guaranties may appropriately be enforced, whether the asserted non-federal ground independently and adequately supports the judgment. * * * 'But where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain.'"

As pointed out above at pages 16 to 18, the recognition or enforcement of the alleged non-federal ground upon which the Appellate Court's judgment is supposed to be based necessarily denies the claims of appellants that they possess fundamental rights, interests and privileges protected by the federal constitution and requires decision of the federal questions. The alleged non-federal ground, therefore, is not such an "independent" non-federal ground as will defeat the jurisdiction of this Court.

Nor will this Court be ousted of jurisdiction to review the judgment of the Appellate Court by the failure of that Court expressly to refer to or pass upon the federal questions presented to it for decision. The intimation to the contrary in Appellees' brief is without merit. In *St. Louis, I. M. & S. R. Co.* v. *Starbird* (1917) 243 U. S. 592, 61 L. ed 917 this Court, in denying a motion to dismiss a writ of error, said at page 601:

> "It has never been required that a Federal right must be denied in terms, but it has been uniformly held that it is sufficient if the state court necessarily denied it in the judgment rendered."

Three cases in point from Illinois are *Chicago Life Ins. Co.* v. *Needles* (1885) 113 U. S. 574, 579, 28 L. ed 1084; *West Chicago Street R. Co.* v. *Illinois* (1906) 201 U. S. 506, 519, 50 L. ed 845; and *Chicago B. & Q. R. Co.* v. *Illinois* (1906) 200 U. S. 561, 580, 50 L. ed 596.

7

The federal questions presented are substantial.

Appellees cite no decision by this Court or any other court which establishes that appellants under the facts and circumstances disclosed by the record in this case, do not have any contractual or vested rights or interests in the subject site. On the other hand, appellants have cited many authorities, including *Cincinnati* v. *Lessee of White* (1832) 6 Peters (U. S.) 431, 8 L. ed 452; *Barclay* v. *Howell's Lessee* (1832) 6 Peters (U. S.) 498, 8 L. ed 477; *Morgan* v. *Chicago and Alton Railroad Co.* (1878) 96 U. S. 716, 24 L. ed 743; and *Close* v. *Glenwood Cemetery* (1883) 107 U. S. 466, 27 L. ed. 408, which sustain the view that appellants are possessed of valuable contractual and vested rights, interests and privileges protected by the federal constitution by reason of the rule of cemetery law which gives persons who own or are interested in gravesites an interest in the Cemetery as a whole, by reason of a common law dedication for cemetery purposes, by reason of a trust impressed upon the land for cemetery purposes, and by reason of appellants' beneficial interest in the note and trust deed of November 26, 1943.

The federal questions presented are not foreclosed by any decision of this Court so as to leave no room for real controversy. They require analysis and exposition for decision and are, therefore, substantial for the purposes of invoking the jurisdiction of this Court.

Conclusion.

There is only one question which pertains to the jurisdiction of this Court to hear these appeals and that it whether appeal no. 98 from the Illinois Appellate Court, or precautionary appeal no. 99 from the Illinois Supreme Court, is from the "highest court of" Illinois "in which a decision could be had" within the meaning of 28 U. S. Code section 1257.

The two appellees who joined in the motion to dismiss seem to believe that the Illinois Appellate Court is the highest court in which a decision could be had for the purposes of appeal to this Court.

Since the record and issues in the two appeals are for all practical purposes identical, postponement of the decision of this jurisdictional question until the hearing and decision on the merits should not impose any additional work upon the Court, or much additional expense or work upon the litigants or counsel.

We respectfully suggest that the Court follow the procedure followed in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert* (1954) 347 U. S. 157, 98 L. ed 583 and thus postpone the decision of this jurisdictional question.

In view of the general importance of the questions presented, we respectfully submit that this Court should hear and decide this case on its merits.

Respectfully submitted,

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